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FILED
LOS ANGELES SUPERIOR COURT

NOV 06 2012

JOHN A. CLARKE, CLERK
BY RAUL SANCHEZ, DEPUTY

8
9 **SUPERIOR COURT OF CALIFORNIA**
10 **FOR LOS ANGELES COUNTY**

11 **SAM LUTFI, an individual,**

12 **Plaintiff,**

13 **vs.**

14 **LYNNE IRENE SPEARS, an**
15 **individual; JAMES PARNELL**
16 **SPEARS, an individual; BRITNEY**
17 **JEAN SPEARS, an individual; and**
18 **DOES 1 through 25, inclusive,**

19 **Defendants.**

Case No. BC 406904

PLAINTIFF'S BRIEF RE
CONSERVATORS' NONSUIT
MOTIONS

Trial:

Date: 11/1/12

Time: 1:30 p.m.

Dept: 71 (Hon. Suzanne G.
Bruguera)

Filed: 2/3/09

Trial: 10/1/12

DCO: 12/24/11

20 **TO THIS HONORABLE COURT AND TO DEFENDANTS AND THEIR**
21 **COUNSEL OF RECORD HEREIN:** Plaintiff Sam Lutfi hereby respectfully
22 submits his Brief responding to the nonsuit motion by the Conservators
23 *in loco* Defendant Britney Spears:
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1 **A. Alleged Variance From the Pleadings**

2 The Conservators' motion argues a variance from the pleadings based
3 on the date of the contract. Actually, the First Amended Complaint alleged
4 negotiation of the contract in June, 2007 and October, 2007,² so the variance
5 is not what the motion claims it is, since Plaintiff's proof was negotiation of an
6 initial contract in June and a revised contract in October.

7 A variance in pleading a *date* is not material absent proof of actual
8 prejudice to the Defendant. See, State Medical Education Bd. v. Roberson
9 (1970) 6 Cal.App.3d 493, 502 (immaterial whether debt repayment obligation
10 accrued in 1962 or 1966); Waller v. Southern Pac. Co. (1967) 66 Cal.2d 201,
11 215-216 (date variance immaterial absent proof it actually misled the adverse
12 party in maintaining his action or defense on the merits); Marsh Wall
13 Products, Inc. v. Henry Marcus Bldg. Specialties (1958) 162 Cal.App.2d 371,
14 380 (complaint alleged transactions on July 1, 1954 but proof at trial was
15 transactions occurring March 30, 1954 through May 25, 1954).

16 As stated in Code of Civil Procedure §469:

17 **"Variance; when material; order for amendment.** No variance
18 between the allegation in a pleading and the proof is to be deemed
19 material, unless it has actually misled the adverse party to his
20 prejudice in maintaining his action or defense upon the merits.
21 Whenever it appears that a party has been so misled, the Court
22 may order the pleading to be amended, upon such terms as may
23 be just."

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27 ² First Amended Complaint, ¶¶ 58-61
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1 A variance as to a date has been held curable by amendment. See, 5
2 Witkin, California Procedure (5th Ed.); Pleading §1211:

3 “In *Foster v. Keating* (1953) 120 C.A.2d 435, 261 P.2d 529, the
4 amendment [to conform to proof] was allowed. . . .The only major
5 change was. . .advancing the date of inception. . .and in
6 characterizing the joint venture agreement as one of the steps
7 taken and devices used by the defendant in accomplishing his
8 plan to misappropriate and convert plaintiff’s business and assets
9 to his own use.”

10 See, also, County Sanitation Dist. No. 2 of Los Angeles County v.
11 County of Kern (2005) 127 Cal.App.4th 1544, 1618:

12 “A pleading may be amended at the time of trial unless the
13 adverse party can establish prejudice. [Citation.]A variance
14 between pleading and proof does not justify the denial of an
15 amendment to conform pleading to proof unless the unamended
16 pleading ‘misled the adverse party to his prejudice in maintaining
17 his action or defense upon the merits. [Citations.]”

18 The variance here is semantic and immaterial. The First Amended
19 Complaint alleged the contract was *negotiated* in June, 2007, an oral contract
20 was made in October, 2007, and performance began in October 2007.³
21 Plaintiff’s proof is that the initial oral contract was made in June, 2007,
22 performance began in June, 2007, Plaintiff *quit* in September, 2007, then
23 returned to work at Britney’s request on October 1, 2007, and the oral
24 contract was revised by amendment on October 13, 2007, with the only

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27 ³ First Amended Complaint, ¶¶58-60

1 significant amendment being an agreement that termination without cause
2 required 90 days notice. If necessary, Plaintiff seeks leave to amend the
3 Complaint to conform to this proof.

4 The Conservators assert a variance from the pleadings but fail to argue
5 *materiality and prejudice*. As noted above, these are essential elements of a
6 nonsuit motion based on a variance motion.

7 The Conservators cite Valerio v. Andrew Youngquist Construction (2002)
8 103 Cal.App.4th 1264, but that case is inapposite since it involved an attempt
9 to contradict a Request for Admission. Likewise, the Conservators cite Smith
10 v. Walter E. Heller & Co. (1978) 82 Cal.App.3d 259, but that case involved an
11 attempt to contradict a long string of judicial determinations.

12 To the extent further explanation is required, then Plaintiff's case
13 should be re-opened so Mr. Lutfi can *explain* how he determined the date of
14 the initial contract agreement based on the "paper trail" and his performance
15 of his duties thereunder, namely, his bringing the drug-sniffing dogs into
16 Britney's home on June 13, 2007⁴ and taking Britney to see attorney Donald
17 S. Passman and Creative Artists Agency head Kevin Huvane on July 1, 2007.⁵
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19 **B. Alleged Contract Uncertainty**

20 The Conservators assert uncertainty as a defense against the contract,
21 but uncertainty is not a viable defense because of *performance* by Plaintiff.
22 See, Carruth v. City of Madera (1965) 233 Cal.App.2d 688, 696 ("Any
23 uncertainty was removed by plaintiff's performance and his request for
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25 ⁴ Exhibit 14

26 ⁵ Exhibit 12
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1 complete performance by city...."); Fisher v. Parsons (1963) 213 Cal.App.2d
2 829, 836 ("Section 33 of Restatement of the Law of Contracts, page 44, says:
3 'An offer which is too indefinite to create a contract if verbally accepted, may,
4 by entire or partial performance on the part of the offeree, create a contract.'")

5 The Conservators' uncertainty defense is also contrary to the doctrine of
6 liberal construction. As stated in 1 Witkin, Summary of California Law (10th
7 Ed. 2005), Contracts, § 140:

8 "To determine that a contract is sufficiently certain to be
9 enforced, the court will liberally interpret laymen's agreements or
10 nontechnical language. 'In considering expressions of agreement,
11 the court must not hold the parties to some impossible, or ideal,
12 or unusual standard. It must take language as it is and people as
13 they are. All agreements have some degree of indefiniteness and
14 some degree of uncertainty. ... The court must not be overly
15 fearful of error; it must not be pedantic or meticulous in
16 interpretation of expressions. ... If the parties have concluded a
17 transaction in which it appears that they intend to make a
18 contract, the court shall not frustrate their intention, if it is
19 possible to reach a fair and just result, even though this requires
20 a choice among conflicting meanings and the filling of some gaps
21 that the parties have left.' (*Rivers v. Beadle* (1960) 183 C.A.2d
22 691, 695, 7 C.R. 170, quoting Corbin; see *McIlmoil v. Frawley*
23 *Motor Co.* (1923) 190 C. 546, 549, 213 P. 971 [The law does not
24 favor but leans against the destruction of contracts because of
25 uncertainty; and it will, if feasible, so construe agreements as to
26 carry into effect the reasonable intentions of the parties if that
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1 can be ascertained']; *Masterson v. Sine* (1968) 68 C.2d 222, 224,
2 65 C.R. 545, 436 P.2d 561 [trial judge properly refused to
3 frustrate clear intention by 'an overly meticulous insistence on
4 completeness and clarity of written expression']; *Haggerty v.*
5 *Warner* (1953) 115 C.A.2d 468, 472, 252 P.2d 373; *Bettancourt v.*
6 *Gilroy Theatre Co.* (1953) 120 C.A.2d 364, 367, 261 P.2d 351;
7 *Schomaker v. Osborne* (1967) 250 C.A.2d 887, 893, 58 C.R. 827; 1
8 Corbin (Rev. ed.), §4.1; 1 Williston 4th, §4:18; 17A Am.Jur.2d
9 (2004 ed.), Contracts §181 et seq.)"

10 The initial contract of June, 2007, had no term but all that means is
11 that it was terminable at will. See, Unterberger v. Red Bull North America,
12 Inc. (2008) 162 Cal.App.4th 414, 420 (contract of indeterminate length
13 terminable at will); Ravel v. Hubbard (1952) 112 Cal.App.2d 255, 259 ("Where
14 a contract is terminable at will, liability attaches for breaches occurring prior
15 to the termination of the contract.")

16 17 **C. Alleged Undue Influence**

18 Plaintiff is disadvantaged in proving the *absence* of undue influence
19 because he was not allowed to depose nor call Britney Spears as a witness,
20 and her testimony would have negated the undue influence charge. Had he
21 been allowed to call her, Britney's testimony would have established, *inter*
22 *alia*, that (a) Britney *proposed* the artist/manager relationship at a time when
23 she had fired everybody and she *needed* management; (b) Britney offered the
24 15% rate of compensation because she knew it was within industry norms
25 and she wanted Plaintiff's services during a relatively low-earning period in
26 her life; (c) Britney *breached* the agreement by using drugs, then requested
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1 that Plaintiff return and resume his duties after he quit; (d) Britney knew that
2 being able to terminate the relationship on relatively short notice (90 days)
3 meant she could adjust the rate of compensation in the event she went on
4 tour and generated a lot of income. All she had to do was terminate 90 days
5 before the tour and renegotiate a lower rate.⁶

6 Since Britney was the *offeror* in June, 2007, and the agreement was
7 made at arms-length, there was no undue influence. See, e.g., Setzer v.
8 Robinson (1962) 57 Cal.2d 213, 216-217 (undue influence does not apply to
9 initial agreement). See, also, In re Marriage of Bonds (2000) 24 Cal.4th 1, 27.

10 To prove undue influence, the Conservators must prove that Plaintiff
11 was in a “dominant and controlling position” in the transaction. Persson v.
12 Smart Inventions, Inc. (2005) 125 Cal.App.4th 1141, 1161 n.9. In fact, the
13 *opposite* was true, since Britney had the money and power and Mr. Lutfi had
14 neither. A review of the videos of Britney browbeating and cursing at Plaintiff
15 – and ordering him around – establishes who was actually in the “power”
16 position in the relationship.⁷

17 Earlier in the case the Conservators contended that Britney lacked the
18 capacity to contract, but they *abandoned* that defense when Plaintiff sought to
19 conduct an Independent Medical Examination.

24 ⁶ On October 30, 2012, the date Plaintiff sought to “call” her to testify,
25 Britney Spears made an appearance on the *Tonight Show*. This was in addition
26 to her regular job as a judge on the television program *X Factor*.

27 ⁷ Exhibits 61, 62

1 **E. Quantum Meruit**

2 Plaintiff elected not to pursue the quantum meruit cause of action to
3 focus the case on enforcing the express contract. As such, that aspect of the
4 nonsuit motion is moot.

5 *Respectfully submitted,*

6 **Dated: November 1, 2012**

**JOSEPH D. SCHLEIMER
ATTORNEY AT LAW**

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9 BY: 
10 **Joseph D. Schleimer, Attorney**
11 **for Plaintiff Sam Lutfi**
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1 **PROOF OF SERVICE**
2 **BY email**

3 I am employed in the County of Los Angeles, State of California. I am
4 over the age of 18 and not a party to the within action. My business address
5 is 9401 Wilshire Boulevard, Suite 1250, Beverly Hills, California 90212.

6 On ***November 1, 2012*** I served the foregoing document described as:
7 ***PLAINTIFF'S BRIEF RE LYNNE SPEARS NONSUIT MOTIONS*** on the
8 interested parties in this action by placing a true copy thereof enclosed in
9 envelopes addressed as follows:

10 **SEE ATTACHED SERVICE LIST**

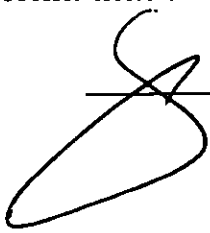
11 **BY email**

12 I emailed this brief to the addressees on the attached service list.

13 Executed on ***November 1, 2012*** at Los Angeles, California.

14 (State) I declare under penalty of perjury under the laws of the
15 State of California that the above is true and correct.

16 Joseph D. Scheimer
17 Type or Print Name

18 
19 Signature

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Lutfi v Spears--Response to Conservators' Motion for Nonsuit

From: **Joseph Schleimer** (schleimerlaw@msn.com)

Sent: Thu 11/01/12 12:53 AM

To: LASC Department 71 (smcdept71@lasuperiorcourt.org)

Cc: Stephen Rohde (rohdevictr@aol.com); Bonita D. Moore Esq. (bdm@birdmarella.com); Leon Gladstone Esq. (lgadstone@gladstonemichel.com); Michael J. Aiken, Esq. (maiken@gladstonemichel.com); Hon. Suzanne Bruguera (sbruguera@lasuperiorcourt.org); Joel Boxer Esq. (jeb@birdmarella.com)

📎 1 attachment

OPP--Mtn Nonsuit by Conservators in loco Britney Spears.pdf (4.3 MB)

Kathleen Tollack

Clerk, Department 71

Dear Ms. Tollack:

Attached please find Plaintiff's responses to the nonsuit motions filed by the Conservators.

As per your instructions in a previous email, I will file the "blue ink" originals in Room 102.

Very truly yours,

Joseph D. Schleimer
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